United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

Original of Mulcahy

Appellant

76-1292

To be argued by
GARY A. WOODFIELD

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1292

B P/S

UNITED STATES OF AMERICA,
Appellee,

—against—

JOHN GIANGRANDE and ANTHONY FAGO,
Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEE

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Eastern District of New York.

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UNITED STATES OF AMERICA,

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JOHN GIANGRANDE and ANTHONY FAGO,

Appellants.

BRIEF FOR THE APPELLEE

Preliminary Statement

John Giangrande and Anthony Fago appeal from an Order of the United States District Court for the Eastern District of New York (Bramwell, *J.*), entered on June 23, 1976, which denied their motion to dismiss the indictment pending against them (75 Cr. 907) on alleged double jeopardy grounds. In denying the motion, the district court rejected appellants' argument that it had abused its discretion when the court, *sua sponte*, declared a mistrial due to "inadvertent", but, nevertheless, prejudicial remarks made during the prosecutor's opening statement on June 22, 1976.

Appellants contend on this appeal that Judge Bramwell's declaration of a mistrial was improper and thus operates as a bar to their reprosecution by reason of the double jeopardy clause of the Fifth Amendment.

Facts

On December 1, 1975, appellants Giangrande and Fago, together with co-defendant Louis James De Salvatore, were indicted by a grand jury sitting in the Eastern District of New York and charged with substantive violations of the federal narcotic laws and related conspiracy (Title 21, U.S.C. §§ 841 and 846).

Immediately prior to the commencement of the trial, but after selection of a jury on June 22, 1976, co-defendant De Salvatore entered a plea of guilty to Count Seven (conspiracy) in satisfaction of the indictment. Thereafter, the trial commenced against appellants Giangrande and Fago. Following the Government's opening statement to the jury, the trial court, out of the presence of the jury, stated its concern about what it characterized as "highly prejudicial" remarks made by the Strike Force Attorney[1] relating to prior narcotic transactions committed by the severed co-defendant De Salvatore and the Government's chief witness, Robert Pincus (A. 57).[2] These acts, which pre-dated the commencement of the instant conspiracy by approximately 2 years and which were discussed at length in the prosecutor's opening, had no apparent direct connection or relation to Giangrande and Fago.[3]

Following the implicit suggestion of the district court, appellant Fago moved, and was thereafter joined by appellant Giangrande, for a mistrial based upon the

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[1] This description refers to Stanley Greenidge, Esq., a Special Attorney of the Department of Justice Organized Strike Force and assigned to the Eastern District of New York Strike Force Field Office.

[2] References are to Appellant's Appendix.

[3] Prior to trial and prior to co-defendant De Salvatore's guilty plea, the district court had ruled that the Government could introduce against De Salvatore evidence of these other criminal dealings involving De Salvatore and Robert Pincus.

prosecutor's opening remarks (A. 59, 60). Before the court could rule, and after further colloquy, the appellants sought without reason to withdraw their motions for a mistrial. The court scheduled a hearing for the next day to hear further argument.

At this hearing, held June 23, 1976, the following colloquy took place (A. 65, 66):

> "The Court: Mr. Oltarsh? [attorney for appellant Giangrande].
>
> Mr. Oltarsh: Yes, sir.
>
> The Court: Have you had a chance to review the minutes from the record yesterday?
>
> Mr. Oltarsh: Yes, I have, your Honor.
>
> The Court: And, Mr. Arone, [attorney for appellant Fago] have you also had a chance to review that?
>
> Mr. Arone: Yes, I have.
>
> The Court: Mr. Oltarsh, you were given an adjournment in order to check the law as to this particular situation. Have you checked the law?
>
> Mr. Oltarsh: Yes, sir. In my opinion, I have.
>
> The Court: Now, the Court was the one that brought this to your attention. Now, will you please tell the Court whether you agree or don't agree. And if you don't find it to be prejudicial, will you state for the record why it is not prejudicial.
>
> Mr. Oltarsh: Well, if your Honor please, you will recall that Mr. Arone had at the conclusion of yesterday's session withdrawn—
>
> The Court: No. I am not going into that. I want you to go into the law. I want you to

explain the results of your research. And if you tell me it is not prejudicial, I want you to state for the record why it is not.

Mr. Oltarsh: Well, from the defendant Giangrande's point of view, your Honor, I feel that the statement—the opening statement of Mr. Greenidge was highly prejudicial—extremely prejudicial, and in all probability, in my humble opinion, would prevent the defendant Giangrande from receiving a fair trial. I don't think that the error——

The Court: Then you are agreeing with the Court.

Mr. Oltarsh: I am. Well, I am agreeing with the Court one hundred per cent only to the extent that the defendant Giangrande does not move for a mistrial.

Mr. Arone's reply was substantially the same (A. 69, 70):

"Mr. Arone: In retrospect, after your Honor pointed them out, I must agree with your Honor's statement. And after learning of the fact that —to tell you the truth, I was copying down notes on what Mr. Greenidge was saying and evidently that portion that your Honor pointed out to us—because I was taking notes on how to answer him in my opening—but, in any event, the point is that now the damage has been done. Since it has been done, I don't think any position on our part could correct it. If we were to ask for a mistrial at this point, I think I would be prejudicing my client's right to have this case dismissed based on the fact that jeopardy has attached by the fact that the jury was impanelled and there-

> after these prejudicial remarks were made, and I think based on the statements your Honor made can tantamount to your Honor declaring a mistrial yesterday, and I believe if that be the case, United States against Jorn makes mention. . . ."

Thus, as is clear, neither appellant moved for a mistrial on June 23, 1976. However, each inexplicably sought a dismissal of the indictment on double jeopardy grounds, arguing that the prosecutor's remarks in his opening statement were prejudicial (A. 68). While each appellant apparently agreed with Judge Bramwell that the prosecutor's remarks were so highly prejudicial that they irreparably tainted the jury, appellants argued, in the district court, that they were entitled to a dismissal of the indictment because they had been denied a jury of their choice (A. 68-70). The Government contended that proof of the prior similar acts relating to the severed co-defendant De Salvatore was admissible against Giangrande and Fago as probative evidence concerning the commencement and development of the conspiracy which involved the appellants. The court rejected this argument.

Thereafter, Judge Bramwell found that the prosecutor's statements in his opening were ". . . inadvertent and there was no intent on the part of the Prosecutor to create or to make an error" (A. 73). Nevertheless, upon finding that these statements were prejudicial, the court *sua sponte* declared a mistrial:"[b]ecause of manifest necessity and in the interest of justice. . ." (A. 74).

Upon the declaration of the mistrial there was no objection by either Giangrande or Fago nor was there any suggestion by either of alternative or corrective measures that the court could have taken to alleviate this problem without the necessity to declare a mistrial. The district court then rescheduled the case for trial. Follow-

ing this rescheduling appellants Giangrande and Fago renewed their motions to dismiss the indictment on double jeopardy grounds. The court's denial of these motions resulted in the instant appeals.

ARGUMENT

The District Court Properly Declared A Mistrial And Reprosecution Is Not Barred By The Double Jeopardy Clause Of The Fifth Amendent.

Appellants contend that their retrial is barred by the double jeopardy clause of the Fifth Amendment. Specifically, they argue that Judge Bramwell erred when he declared a mistrial based upon statements in the prosecutor's opening remarks concerning co-defendant De Salvatore. In support of their argument appellants allege that the prosecutor's statements were not, as the district court found, inadvertent, but rather "purposeful and intentional." They also contend that they should not be subjected to a retrial since they neither sought nor caused the mistrial.

Appellants' claims are without merit. The declaration of a mistrial constituted a proper exercise of the discretion vested in the trial judge as the one "best situated intelligently to make a decision," based upon the facts then known to him. *Gori* v. *United States*, 357 U.S. 364, 368 (1961).

The general guidelines established by Justice Story in *United States* v. *Perez*, 22 U.S. (9 Wheat) 579 (1824), to determine when reprosecution is consistent with the policies served by the double jeopardy clause of the Fifth Amendment have been continually adhered to for more than 150 years. *United States* v. *Dinitz*, — U.S. —, 96 S. Ct. 1075 (1976). In *Perez*, in determining whether the trial judge had properly exercised his discretion when he discharged the jury without consent of the defendant

because it was unable to reach a verdict, thus allowing reprosecution, Justice Story stated, *supra*, 22 U.S. at 580:

> "... [T]he law has invested courts of justice with the authority to discharge a jury from giving any verdict, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for the act, or the ends of public justice would otherwise be defeated. They are to exercise a sound discretion on the subject, and it is impossible to define all the circumstances which would render it proper to interfere."

Courts have recognized the difficulty in attempting a rigid or mechanical application of the rule announced in *Perez*. *Illinois* v. *Somerville*, 410 U.S. 458, 462 (1973); *United States* v. *Jorn*, 400 U.S. 470, 480 (1971); *Wade* v. *Hunter*, 336 U.S. 684, 690 (1949); *United States* v. *Gentile*, 525 F.2d 252, 255 (2d Cir. 1975); *United States* v. *Beckerman*, 516 F.2d 905, 907 (2d Cir. 1975). Accordingly, in determining when it is proper for a court to abort a criminal trial without giving rise to a defense of double jeopardy, the cases have held that the pattern of events which precedes the discharge of the jury must be examined. *United States* v. *Beckerman*, *supra*, 516 F.2d at 907; *United States* v. *Glover*, 506 F.2d 291, 295 (2d Cir. 1974).

Particularly instructive is the case of *United States* v. *Gentile*, *supra*, the facts of which substantially parallel those of the present case. In *Gentile*, the trial was aborted when the district court judge found prejudicial the prosecutor's reference to a possible defense of entrapment in his opening statement. There, as here, the defendant, after joining in the argument over the impropriety and prejudicial nature of the Government's conduct, would not consent to a mistrial. Quite apart from defense counsel's action in "helping to lead the judge to the precipice", this Court held the defendant's claim of double jeopardy had to fail under the principles articulated in *United States* v.

Gori, 367 U.S. 364 (1961) and *United States* v. *Jorn*, 400 U.S. 470 (1971). The *Gentile* panel's reliance on *Gori* and *Jorn* is significant.

In *United States* v. *Gori*, 367 U.S. 364 (1961), the trial court, finding prejudicial a line of questions by the prosecutor intended to elicit evidence of other crimes by the defendant, declared a mistrial, *sua sponte*, and without defendant's consent. This Court found the trial judge's actions in declaring a mistrial "overassiduous" and "overzealous" but nevertheless held that the reprosecution was proper. *United States* v. *Gori*, 282 F.2d 43, 46 (2d Cir. 1961). The Supreme Court, after acknowledging this Court's findings, affirmed its decision, stating (367 U.S. at 368):

> "Suffice that we are unwilling, where it clearly appears that a mistrial has been granted in the sole interest of the defendant, to hold that its necessary consequence is to bar a retrial".

In *United States* v. *Jorn*, *supra*, the defendant was charged in an information with willfully assisting in the preparation of fraudulent income tax returns. Following the impanelling of the jury, the prosecutor called to the stand a taxpayer whom the defendant had allegedly aided in the preparation of a fraudulent return. Although the judge warned the witness of his constitutional rights and the witness expressed a willingness to testify and stated he had been warned of his rights, the judge refused to permit him to testify until he had consulted an attorney, not believing that the witness had been so warned. Although advised that other Government witnesses had been properly warned of their Constitutional rights, the judge stated the warnings were insufficient, discharged the jury, and aborted the trial so that the witnesses could consult with their attorneys. Thereafter, the trial court dismissed the indictment on double jeopardy grounds and the Government appealed. In its opinion affirming the dismissal of the indictment, the Supreme Court stated, 400 U.S. at 487:

> It is apparent from the record that no consideration was given to the possibility of a trial continuance; indeed, the trial judge acted so abruptly in discharging the jury that, had the prosecutor been disposed to suggest a continuance, or the defendant to object to a discharge of the jury, there would have been no opportunity to do so . . . . it seems abundantly apparent that the trial judge made no effort to exercise a sound discretion to assure that, taking all the circumstances into account, there was a manifest necessity for a *sua sponte* declaration of this mistrial.

The facts of this case clearly bring it within "the *Gori-Jorn* composite standard of lack of abuse of discretion in declaring a mistrial because of an inadvertent error of the prosecutor and benefit to the defendant as the sole motivation" recognized by Judge Friendly in *United States* v. *Gentile, supra* at 257.[4] Certainly it was entirely reasonable for the district court to conclude that the prosecutor's opening statement, which discussed in detail narcotic transactions involving the severed co-defendant De Salvatore and which pre-dated by two years the acts alleged in the indictment, was prejudicial. Indeed, this finding was concurred in by both appellants, who claimed that they would be prevented from receiving a fair trial due to the prosecutor's remarks and who themselves initially moved for a mistrial (A. 65, 66). Finally, there is absolutely nothing in the record to indicate that Judge Bramwell was motivated by anything but concern for the rights of the defendants when he declared the mistrial.[5]

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[4] As Judge Friendly pointed out in the *Gentile* case, *Gori*, contrary to the claims of appellants, has not been modified or overruled by subsequent decisions. *United States* v. *Gentile, supra* at 256-257; See also, *United States* v. *Glover*, 506 F.2d 291, 294 (2d Cir. 1974).

[5] It is worthy to note that this concern is what distinguishes this case from *Jorn* where the trial court's motivation in declaring a mistrial was to benefit witnesses not the defendant. See, *United States* v. *Spinella*, 506 F.2d 426, 431 (8th Cir. 1975).

As indicated above, appellants attempt to support their double jeopardy claim by arguing that the remarks in the prosecutor's opening statement concerning De Salvatore were "purposeful and intentional overreaching." (Brief of appellant Giangrande, page 17) The claim is baseless.

Quite simply, there is nothing in the record below to show bad faith on the part of the prosecutor. See, e.g. *United States* v. *Dinitz*, — U.S. —, 96 S. Ct. 1075 (1976); *United States* v. *Jorn*, *supra*, 400 U.S. at 485 *Downum* v. *United States*, 372 U.S. 734, 736 (1963). On the contrary, the district court expressly found that the statements in the Government's opening were ". . . inadvertent and there was no intent on the part of the prosecutor to create or to make an error" (A. 73). Inasmuch as the parties were before him in court, Judge Bramwell was clearly in a position to be able to make this finding.[6]

Also without merit is appellants' claim that their retrial should be barred because they withdrew their motion for a mistrial and because the declaration of a mistrial was precipitated by acts of the prosecution. Suffice it to say that *Gori*, *Dinitz* and *Gentile* all involved situations where the defense failed to consent to the granting of a mistrial. Moreover, such an argument by the defendants in this case attempts to overlook the fact that it

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[6] Moreover, the setting in which the prosecutor's remarks were made further supports the conclusion of Judge Bramwell that the Strike Force Attorney was not acting in bad faith. Prior to De Salvatore's guilty plea, Judge Bramwell ruled that the Government could introduce evidence of prior narcotic transactions involving De Salvatore. See, e.g., *United States* v. *Papadakis*, 510 F.2d 287 (2d Cir. 1975). The prosecutor, in defending his opening, contended that these similar acts could also be introduced to show the commencement and development of the conspiracy even though De Salvatore was not on trial (A. 89). In this light, it was proper for Judge Bramwell to determine that the prosecutor acted not in bad faith, but rather on an apparently erroneous understanding of the Court's ruling.

was appellants, through their claims of prejudice and through their initial motions for a mistrial who "led the judge to the precipice . . ." *United States* v. *Gentile*, *supra*, 522 F.2d at 255.

In this case, Judge Bramwell acted out of a justified concern with the possible effect of the prejudicial remarks of the prosecutor upon the jury, a concern which was concurred in by both appellants. Moreover, the trial court's declaration of a mistrial, which took place prior to the introduction of any evidence, *United States* v. *Gentile*, 525 F.2d at 256; *United States* v. *Glover*, 506 F.2d at 297-298, was only made after appellants were given time to fully research the problem. From the record, it is clear that the court remained open to suggestions of alternative remedial measures but was left no choice but to declare a mistrial due to the prosecutor's remarks and the implicit urging of appellants (A. 65, 66). Reprosecution should not be barred by the double jeopardy provisions of the Fifth Amendment.

CONCLUSION

The Order of the District Court should be affirmed.

Dated: July 30, 1976

Respectfully submitted,

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* The United States Attorney's Office wishes to acknowledge the invaluable assistance of Arnold Klein in the preparation of this brief. Mr. Klein is a third year law student at New York Law School.

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(Rev. 1-29-71)

AFFIDAVIT OF MAILING

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EASTERN DISTRICT OF NEW YORK, ss:

LYDIA FERNANDEZ, being duly sworn, says that on the 2nd day of August, 1976, I deposited in Mail Chute Drop for mailing in the U.S. Courthouse, Cadman Plaza East, Borough of Brooklyn, County of Kings, City and State of New York, two copies of Brief for the Appellee of which the annexed is a true copy, contained in a securely enclosed postpaid wrapper directed to the person hereinafter named, at the place and address stated below:

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Martha Jackson

Sworn to before me this
2nd day of August, 1976

Lydia Fernandez

LYDIA FERNANDEZ

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United States Attorney,
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To:
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Attorney for _____

_____ Action No._____

UNITED STATES DISTRICT COURT
Eastern District of New York

—Against—

_____
United States Attorney,
Attorney for _____
Office and P. O. Address,
U. S. Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201

Due service of a copy of the within _____ _____is hereby admitted.
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